Legislative Summary LS-397E

BILL C-11: THE IMMIGRATION AND REFUGEE PROTECTION ACT

Jay Sinha
Margaret Young
Law and Government Division

26 March 2001
Revised 31 January 2002

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104-03263/

LEGISLATIVE HISTORY OF BILL C-11

HOUSE OF COMMONS	
Bill Stage	**Date**
First Reading:	21 February 2001
Second Reading:	27 February 2001
Committee Report:	28 May 2001
Report Stage:	4 June 2001
Third Reading:	13 June 2001

SENATE	
Bill Stage	**Date**
First Reading:	14 June 2001
Second Reading:	27 September 2001
Committee Report:	23 October 2001
Report Stage:	
Third Reading:	31 October 2001

Royal Assent: 1 November 2001

Statutes of Canada 2001, c. 27

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-11: THE IMMIGRATION AND REFUGEE PROTECTION ACT

Bill C-11, An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger (the Immigration and Refugee Protection Act), received first reading in the House of Commons on 21 February 2001.

Bill C-11 was preceded by Bill C-31, of the same title, which received first reading in the House of Commons and was referred to the House of Commons Standing Committee on Citizenship and Immigration on 6 June 2000, following second reading. The Minister of Citizenship and Immigration, Departmental officials, and the Immigration and Refugee Board appeared before the Committee, but further study of the bill ended when the election was called and the 36th Parliament ended in October 2000; thus, Bill C-31 died on the *Order Paper*. The differences between Bill C-11 and Bill C-31 are largely organizational and technical, but there are also important substantive changes, which are described throughout this legislative summary.

Bill C-11 would repeal and replace the current *Immigration Act*.(1) The bill thus covers all the non-administrative aspects of immigration:

- the selection of immigrants;
- who is admissible and inadmissible to Canada;
- enforcement of the law;
- detention and release;
- appeals;
- refugee protection;
- the Immigration and Refugee Board;
- immigration offences; and
- numerous other technical matters.

On 27 February 2001, Bill C-11 received second reading and was referred to the House of Commons Standing Committee on Citizenship and Immigration. The Committee held

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(1) R.S.C. 1985, c. I-2.

hearings with witnesses through March, April and into May, including travelling to Vancouver, Winnipeg, Toronto and Montreal;[2] it reported the bill back to the House with numerous amendments on 28 May 2001.[3] Following Report Stage in the House, further amendments to the bill were adopted.

Bill C-11 received first reading in the Senate on 14 June 2001. Upon second reading on 27 September 2001, the bill was referred to the Standing Senate Committee on Social Affairs, Science and Technology. The Committee held hearings with witnesses through October and reported the bill back to the Senate with no amendments on 23 October 2001. To its Report, the Committee appended detailed Observations outlining its concerns. On 31 October 2001, the bill received third reading in the Senate; Royal Assent was given on 1 November 2001.

The House of Commons Standing Committee on Citizenship and Immigration is currently reviewing the regulations that will accompany the new *Immigration and Refugee Protection Act*. The Committee will hear witnesses on the regulations through February 2002, and the Act is expected to come into force on 28 June 2002, once the regulations are complete.

The following description is based on the bill as adopted by the House of Commons **and the Senate. This legislative summary does not consider the regulations that will accompany the new Act once it comes into force.** Although every effort has been made to summarize the bill and substantive amendments accurately, reference should be made to the bill itself.

BACKGROUND

The recent process of immigration reform began late in 1996 with the appointment of a three-person panel charged with reviewing all aspects of immigration law, policies and practices. Its members consulted widely, and their report was publicly released in

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(2) Witnesses from Regina and Halifax were also heard by the Committee via teleconference in Winnipeg and Montreal, respectively.

(3) The bill was reprinted with the Committee amendments indicated for use at Report Stage in the House of Commons.

January 1998.[4] The Minister of the time continued to consult the public and in January 1999 released a discussion document that further contributed to the reform process.[5] In the summer of 1999, the arrival of the four boatloads of Chinese migrants placed pressure and additional public attention on Canada's immigration and refugee systems, and intensified the process of review and reform. In March 2000, the Standing Committee on Citizenship and Immigration contributed to the debate with a report entitled *Refugee Protection and Border Security: Striking a Balance*.

A good deal of the structure of the current *Immigration Act* dates from the mid-1970s. The refugee determination system and the Immigration and Refugee Board were introduced in 1989; they were significantly modified in early 1993. Major amendments to the rest of the Act also came into force in early 1993, and again in 1995. Thus, while it is true to say that the current Act dates from the mid-1970s, it is also true that it has been continually modified since that time. In the process, there is no doubt that its complexity increased considerably.

GENERAL MATTERS RELATING TO THE BILL

A. Style

For the most part, Bill C-11 is written in simpler language than the current Act; the style also avoids the numerous cross-references, identified only by section number, that plague the current Act. Provisions that cover similar areas have been consolidated. Thus, the bill should be more readily accessible and understandable. The terminology has also been simplified, some new terms introduced, and many old ones dropped. For example, the term "foreign national" is used to refer to all but Canadian citizens and permanent residents. Interestingly, the word "immigrant" does not appear, nor does the word "visitor." For the first time, there would be a reference to "instructions" that would be given by the Minister, although these would not be regulations.

The bill would produce an Act that would be considerably shorter than the current legislation. There are a number of reasons for this, including the consolidation mentioned above,

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(4) Immigration Legislative Review, *Not Just Numbers: A Canadian Framework for Future Immigration*, 1998.

(5) Citizenship and Immigration Canada, *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation*, 1999.

but a major one is the fact that the regulation-making powers are very extensive.[6] Thus, a bare reading of the Act does not provide a complete picture of the immigration and refugee program.

The fact that so much will be left to be covered by the regulations has led to confusing reports about the contents of the bill. A significant number of the press reports have highlighted matters that are not, in fact, in the bill itself, but in the announced intentions of the Department of Citizenship and Immigration with regard to the regulations, or to administrative changes. Care should thus be taken in assessing public comments about the bill.[7]

In many respects, the bill mirrors the current Act, although the extensive restructuring may obscure this fact.

B. Interpretation (Clause 2)

The difference in style between the current Act and the bill is apparent immediately. The interpretation section in the current Act defines 47 terms; in the bill, five terms are defined in the English version and only four in the French. Although the simplification is welcome, it leads to some problems. For example, there is no definition of "removal order"; this would suggest that there might be different kinds of orders, as is the case in the current law (although it could be done by regulation). In contrast to Bill C-31, Bill C-11 contains a definition of "permanent resident." As noted, the term "immigrant" would be a relic of the past. A number of key definitions are found elsewhere in the bill, but many would be left to the regulations. This may make the law less accessible.

Two of the definitions would be new. As mentioned above, the term "foreign national" (in the English only) would be used to refer to any person who is not a Canadian citizen or a permanent resident. In the House Committee, the foreign national definition was amended to distinguish permanent residents. A reference to the Convention Against Torture would also be new, and would have significance in relation to refugee protection. The Schedule to the bill would set out the definition of torture found in section 1 of that Convention.

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(6) Of course, it should be noted that the enabling powers of the current Act are also extensive.

(7) In view of the importance of the regulations, the government provided the House of Commons Standing Committee on Citizenship and Immigration with a broad "Explanation of Proposed Regulations" under Bill C-11. Information about the regulations is available on the Department's website http://www.cic.gc.ca/english/about/policy/imm-act.html.

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C. Objectives and Application (Clause 3)

Clause 3 would divide the Act's objectives into those relating to immigration and those to refugees. All of the objectives in the existing Act, with one exception, would be retained, with some minor wording changes. The exception is a reference to the "attainment of demographic goals ... in respect of the size, rate of growth, structure and geographic distribution of the Canadian population," which has been removed. There would thus be no general link between demographics and immigration in the new Act.[8] A new immigration objective would be to support the attainment of immigration goals established by the Government of Canada and the provinces through consistent standards and prompt processing.

Several amendments were made in the House Committee and at Report Stage to the objectives relating to immigration. The objective of enriching and strengthening the cultural fabric of Canadian society, while respecting the federal and bilingual character of Canada, would be broadened to include respect for Canada's "multicultural" character. The Committee added the objective of supporting and assisting the development of minority official language communities in Canada. The objective of promoting international justice and security was expanded to include promotion of "respect for human rights." The Committee also added a new objective to ensure cooperation with the provinces "to secure better recognition of the foreign credentials of new Canadians and their more rapid integration into society." In the House of Commons, "new Canadians" was changed to just "permanent residents."

The objectives relating to refugees would be considerably expanded. Clause 3 would introduce references to:

- the general purposes of refugee protection;
- resettlement;
- the establishment of fair and efficient procedures to maintain the integrity of the refugee protection system;
- the importance of refugee integration; and
- the promotion of "international justice and security by denying access to foreign nationals, including refugee claimants, who are serious criminals or security risks."

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(8) The only reference to demographics is in clause 10(2), which requires the Minister to consult with the provinces regarding immigration levels and distribution in Canada, "taking into account ... demographic requirements."

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The Act would have to be interpreted and applied so as to:

- further Canada's interests;
- promote accountability and transparency;
- facilitate cooperation among Canadian governments and with foreign governments and bodies;
- ensure that decisions taken under the Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination, and of the equality of the English and French languages;[9]
- support the government's commitment to enhance the vitality of the English and French linguistic minority communities in Canada (as amended by the House Committee); and
- comply with international human rights instruments to which Canada is a signatory (as amended by the House Committee).

D. Enabling Authority (Clauses 4-6)

These clauses would establish the Governor in Council as the maker of all regulations under the Act (except where provided otherwise). In response to concerns that clause 5 provided regulation-making authority that was too broad, the House Committee removed the authority to make any regulation considered "necessary" to carry out the provisions of the Act. The Committee also added a provision requiring all proposed regulations made pursuant to clauses 17 (examination), 32 (rights and obligations of permanent residents), 53 (loss of status and removal), 61 (detention and release), 102 (examination of eligibility to refer a claim for refugee protection), 116 (pre-removal risk assessment), and 150 (transportation companies), to be tabled in the House of Commons and the Senate, and referred by each House to the appropriate committee of that House.[10] Any proposed regulation that was laid before each House would not have to be tabled again, whether or not it was altered. As well, the regulation could be made *any time* after the proposed regulation was laid before each House.

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(9) Originally in Bill C-11, ensuring consistency with the Charter would have explicitly applied only to "people seeking admission." The House Committee expanded this to all decisions under the Act. The explicit references to equality and freedom from discrimination were not present in Bill C-31.

(10) One may question why the same treatment would not be accorded to *all* proposed regulations, including those under clauses 26 (entering and remaining in Canada), 43 (inadmissibility), 88 (loans), 89 (fees), 91 (representation), 137 (forfeiture), 140 (seizure), 144 (ticketable offences), 147 (garnishment), and 201 (transitional provisions).

The Minister could appoint officers to administer the Act,[11] although a limited number of specified powers could not be delegated. As is now the case, these would concern decisions relating to such serious matters as whether the admission of a person would be in the national interest and the signing of a security certificate. In the House Committee, an amendment was made that would enable the Minister to delegate her decision-making power in risk assessment cases, thus allowing implementation of provisions for an oral pre-removal risk assessment hearing in exceptional circumstances.

E. Agreements (Clauses 7-10)

As in the current Act, the bill would authorize the Minister, with the approval of the Governor in Council, to enter into agreements with foreign governments respecting the administration of the Act. As an example, this would permit the signing of agreements governing the return of refugee claimants. The power to also enter into agreements with international organizations would be new. The power to enter into agreements with the provinces would be continued, with a new requirement for the Minister to publish an annual list of the federal-provincial agreements in force.

Clause 9 specifies the rules that would govern the admission of permanent residents to a province with such an agreement. Sponsors refused for financial reasons would be required to use the provincial appeal mechanism (unless the agreement specified otherwise) and could not use the mechanism under the Act. They could, however, apply for humanitarian and compassionate consideration.

As in the current Act, clause 10 would *require* the Minister to consult with the provinces regarding future immigration levels, the distribution of immigrants in Canada (including considerations of regional economic and demographic requirements), and integration measures. Under a new provision, the Minister *might* consult with the provinces regarding policies and programs in order to facilitate cooperation and enable the federal government to take into consideration how the provinces would be affected by the Act.

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(11) Throughout Bill C-31, such officers were referred to as "designated officers." The word "designated" has been removed in Bill C-11.

PART 1: IMMIGRATION TO CANADA

A. Division 1, Requirements before Entering Canada and Selection (Clauses 11-14)

1. Requirements before Entering Canada

Clause 11 restates the fundamental principle of the current Act that, before entering Canada, a foreign national must apply to an immigration officer for whatever documents are required by the regulations. Section 8 of the current Act provides that people applying to come to Canada are presumed to be immigrants unless they establish otherwise; this presumption would be dropped in view of the dual intent provision in clause 22(2). This would be a significant change, which would facilitate temporary but legitimate residence by those who might wish to consider applying for permanent resident status, or who had already done so.

2. Selection of Permanent Residents

Clause 12, in effect, sets out the three broad classes of immigrants and their essential characteristics:

- *Family class members* would be required to have one of the following specified relationships to a Canadian citizen or permanent resident: spouse, common-law partner, child, parent[12] or other prescribed family member. The definitions of "common-law partner" and "child" are not in the bill, but would be left to the regulations.[13]
- *Economic class members* would be selected on the basis of their ability to become economically established in Canada.
- *Refugees* would be divided into two sub-groups: Convention refugees, and persons in similar circumstances.[14] "Convention refugee" is defined in Part 2 of the bill dealing with refugee protection. A "person in similar circumstances" would include a "person in need of protection," which is also defined in Part 2, and any other potentially eligible person who does not come within the Convention refugee definition.

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(12) The addition of "parent" to the list is new from Bill C-31.

(13) The news release accompanying the bill states that "child" will be defined to include those under age 22 (currently under age 19), and "common-law partner" will be defined to include same-sex partners. Certain nuances may be necessary for the latter definition in view of the often special circumstances in an immigration situation.

(14) Bill C-31 would have divided Convention refugees and protected persons into four subclasses: the Convention refugees overseas class; the Convention refugees in Canada class; the humanitarian class; and the persons in need of protection class. Under Bill C-11, the former two would be included in the "Convention refugee" class, and the latter two would be folded into the "persons in similar circumstances" grouping.

3. Sponsorship of Foreign Nationals

Clause 13 merely states that Canadian citizens or permanent residents would be able to sponsor family class members to enter and remain in Canada, and groups would be able to sponsor Convention refugees and persons in similar circumstances. New to the law would be the express statement that sponsorship undertakings would be binding, and that officers would be required to enforce them in accordance with any Ministerial instructions.

4. Regulations

Regulations in this Division could define any term (thus, "child" and "common-law partner") and prescribe all of the details relating to the general and sub-classes of foreign nationals described above. As is done currently, the selection criteria for the economic class (the "points system") would be set by regulation, including the weighting of the criteria and the procedures to be followed in applying them. Interestingly, circumstances would be established in which officers could substitute for the criteria their own assessment of whether a candidate would be likely to become economically established.[15]

Regulations would also establish: the number of applications that could be accepted, processed or approved in a year; the number of visas that could be issued; and what measures could be taken if the number were exceeded. The conditions that could be applied to visas would be specified, as would details relating to sponsors' undertakings and the consequences of any breach of these.

Regulations would also allow for the designation of classes of people, such as spouses, foreign workers or foreign students, who could be eligible for landing from within Canada.

Because it is envisaged that outside institutions or organizations would provide recommendations to the Minister, or even make decisions, regulations could be made to govern that process.

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(15) There is now a discretion whereby an officer may accept a candidate who is just short of receiving the required points if the officer is of the opinion that the points achieved underestimate the ability of the person to be successful in Canada. The wording of the bill may suggest that a broader power could be available to officers in future.

B. Division 2, Examination (Clauses 15-17)

These clauses would give officers powers to examine applicants – whether Canadian citizens, permanent residents, or visitors ("a foreign national other than a permanent resident") – to determine their admissibility to Canada. Under Bill C-31, officers would have been authorized to examine any foreign national they "believed" might be inadmissible. Originally, Bill C-11 would have required the officer to have "reasonable grounds to believe" the foreign national might be inadmissible. In response to concerns of witnesses regarding protection of the rights of permanent residents, the House Committee amended the bill to remove the authority of an officer to compel persons to appear for or produce documentation for an examination on the basis that the person *might* be inadmissible.

Bill C-31 set out detailed objectives of examinations, which emphasized that inadmissibility would be treated as an ongoing matter. These are not present in Bill C-11, presumably because they were strongly criticized by several commentators on Bill C-31. Also new from Bill C-31 is the requirement that only documentation supplied by the province would be considered with respect to foreign nationals intending to reside in a province with a federal-provincial agreement, as long as the person came within the provincial selection criteria.

The existing duty on applicants to answer all questions truthfully and provide the required documents would continue. Visitors would be required to submit to a medical examination on request, and – new from Bill C-31 – might be required to submit photographic and fingerprint evidence. Such evidence could also be obtained for identification and compliance purposes from any foreign national who is arrested, detained or subject to a removal order. The current powers of officers to board vehicles, inspect passengers, seize documents, and arrest vehicles would be continued.

In addition to covering any other matter with regard to the Division, regulations could be made regarding the conduct of examinations; the Minister could also provide instructions on the same matter.

C. Division 3, Entering and Remaining in Canada (Clauses 18-32)

1. Entering and Remaining

As in the current law, the bill provides that people seeking to enter Canada would have to appear for an examination.(16) In the House Committee, the bill was amended to allow examinations of persons in a transit or departure area of an airport who wish to leave that area. Canadian citizens and registered Indians under the Canadian *Indian Act* would have a *right* to enter and remain, while permanent residents could enter if the officer determined that the person had that status.

Upon entry, to become a permanent resident or a temporary resident (i.e., a visitor), the foreign national must have the prescribed documentation. New from Bill C-31 and new to the current Act, Bill C-11 would require permanent residence applicants intending to reside in a province with a federal-provincial agreement to establish that they have a provincial document indicating that they comply with the provincial selection criteria.

2. Status and Authorization to Enter

These clauses would authorize officers to admit people as permanent residents if their paperwork was in order, and to grant temporary residence to people if satisfied of their intentions. As previously noted, the word "visitor" would no longer be used. An important new aspect of the law would be the introduction of "dual intent." People could be granted temporary entry even if their ultimate goal was to become a permanent resident, as long as the officer was convinced that their current intention was to stay on a temporary basis only.

In an attempt to deal with the "limbo" problem faced by persons who have been granted refugee status,(17) the House Committee added to clause 21 a provision explicitly stating in the Act that such protected persons would become permanent residents as long as they have

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(16) As an example of streamlining the language of the Act, the current provision states: "Subject to the regulations, every person seeking to come into Canada shall appear before an immigration officer at a port of entry, or at such other place as may be designated by a senior immigration officer, for examination to determine whether the person is a person who shall be allowed to come into Canada or may be granted admission." The bill states: "Every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada."

(17) The Committee heard testimony from many witnesses about difficulties faced by recognized refugees in getting travel documents and finding employment, and about delays in obtaining permanent resident status.

met all requirements under the Act and regulations, including not being inadmissible on such grounds as security, human or international rights violations, serious or organized criminality, or health.

As in the current law, officers could issue permits, cancellable at any time, to inadmissible people if circumstances justified that action. The Minister could issue instructions on the matter. New from Bill C-31 and new to the current Act, Bill C-11 adds that such permits would not take effect until the foreign national was examined upon arrival in Canada.

Clause 25 would continue the important power of the Minister to override the provisions of the Act and grant permanent residence, or an exemption from any applicable criteria or obligation under the Act, on humanitarian and compassionate grounds or for reasons of public policy.[18] New to the law would be the requirement that the Minister would have to take into account the best interests of a child directly affected by the decision. This reflects the July 1999 decision by the Supreme Court of Canada in the *Baker* case.

In response to numerous criticisms by witnesses about the consideration of such humanitarian and compassionate applications being at the Minister's discretion, the House Committee amended the wording of clauses 25 and 26 to ensure that the Minister "shall" at least examine each application.

Regulations would govern all details relating to the above matters, including permanent and temporary resident status.

3. Rights and Obligations of Permanent and Temporary Residents

The bill would clarify the residency requirements for permanent residents, a matter that has been problematic for years.[19] The main rule, to which there would be important exceptions, would be that, to retain permanent residence, a person would be required to be physically present in Canada for at least two years (730 days) out of every five. Certain persons would be deemed to be in Canada, even though they were away:

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(18) Currently, this power is given to the Governor in Council, who has circuitously delegated it to the Minister. The criterion of public policy would be new.

(19) Section 24 of the current law provides, generally, that a person loses permanent residence when he or she: 1) leaves Canada with the intention of abandoning Canada permanently; 2) is outside of Canada for more than six months per year, unless the person can convince an officer that there was no intention to abandon Canada. Returning resident permits are available.

- Spouses, partners or children of Canadian citizens who accompanied the citizen. Any reason for the absence would qualify.

- Permanent residents employed on a full-time basis by a Canadian business or in the federal or a provincial public service, and the spouses, partners and children who accompanied them.

Bill C-11 sets out in greater detail than in Bill C-31 how the residency obligation would be calculated. For those who had been a permanent resident for less than five years, they would qualify if they could meet the obligation in respect of the five-year period *immediately after they became a permanent resident*. Those who had been permanent residents for more than five years would qualify if they could meet the obligation in relation to the five-year period *immediately before the examination*.

Also new from Bill C-31 is the provision in Bill C-11 for officers to override any breaches of the residency obligation on the basis of humanitarian and compassionate considerations and the best interests of a child.

In addition to those precise provisions, regulations could be made governing any aspect of the residency obligation. Thus, although clause 28 would permit absences of permanent residents based on *employment* necessity to be counted as residence, the regulations could open the door to the *self-employed*, or to those employed by overseas firms, thus potentially compounding the problem of the "absentee" permanent resident.

These provisions should be considered in conjunction with those in any new citizenship legislation that may be proposed in the future. For example, the former Bill C-16[20] would have required physical presence in Canada for three of the six years preceding a citizenship application.

Clause 30 deals with the rights of children of temporary residents to attend school. In general, *all children* would be permitted to attend school up to the university level; however, if a parent did not have authorization to work or study, a child would require an authorization.

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(20) Bill C-16, The Citizenship of Canada Act, was introduced in the House of Commons on 15 November 1999. The bill died on the *Order Paper* when Parliament dissolved upon the election call in October 2000.

4. Status Document

Clause 31 states that permanent residents and protected persons[21] would receive a document as proof of that status, unless an officer determined otherwise.[22] The government first introduced the concept of such a card in Bill C-86, which was passed by Parliament in 1992. In the House Committee, the bill was amended to ensure that protected persons would receive status documents; this was in response to calls by many witnesses that the bill should comply with Refugee Convention provisions on the issuance of documents to refugees.

New from Bill C-31, Bill C-11 would explicitly enable permanent residents outside Canada who do not have a status document to be issued a travel document if they:

- complied with the residency obligation;
- had been the object of a humanitarian and compassionate grounds determination; or
- had been in Canada at least once in the year before the examination and have, while outside Canada, appealed their residency determination, or the period for making such an appeal has not yet expired.

5. Regulations

Regulations could be made covering all matters discussed above, including definitions, classes of temporary residents such as students and workers, and selection criteria. As noted, regulations could set out further rules relating to the residency obligation.

D. Division 4, Inadmissibility (Clauses 33-43)

These are very important clauses. Inadmissibility could result (unless otherwise specified) from past, present and future events, and would also cover omissions. Although the current Act contains implicit groupings of inadmissibility provisions, the bill would add clarity to these groupings and simplify them. There would be nine grounds of inadmissibility, some with sub-categories. They are noted below in the order in which they appear in the bill.

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(21) As defined in clause 95(2), "protected persons" are those upon whom refugee status has been conferred.

(22) Clause 200 provides that cards would not have to be provided to those who were permanent residents at the time the Act came into force.

Security: The bill would continue to make inadmissible those connected to: espionage; subversion against a democratic government; subversion *by force* of any government;[23] terrorism; being a danger to the security of Canada; engaging in acts of violence that could injure Canadians; or being a member of an organization involved in espionage, subversion or terrorism. As is currently the case, however, the Minister could admit such persons if their presence would not be detrimental to the national interest.

Human or International Rights Violations: This ground would continue the prohibition against war criminals and senior officials of regimes that violate human or international rights norms (by terrorism, serious human rights violations, war crimes, or crimes against humanity). Currently, the list of senior officials is included in the Act; the bill would make the list subject to regulations. Originally, a new provision would also have made inadmissible representatives of a government against which Canada had imposed sanctions, or had the intention to do so. In the House Committee, this provision was broadened to encompass all persons, other than permanent residents, whose entry into or stay in Canada was restricted by sanctions imposed by an international organization or association of states of which Canada was a member. The intent of this amendment was to ensure that the government would be able to fully implement sanctions imposed by the international community and supported by Canada. As is currently the case, the Minister could admit persons described in this paragraph if their presence would not be detrimental to the national interest. That decision could not be delegated. The explicit reference to "international" rights is new to Bill C-11, and also appears in other areas of the bill.

Serious Criminality: "Serious criminality," as defined, would make inadmissible all foreign nationals applying for permanent or temporary residence, or, if they were in Canada, would warrant their removal. The definition would also apply to permanent residents. A variant of this definition would apply for the purpose of refugee protection. The following chart illustrates the proposed rules:

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(23) In the current law, subversion by force of any government must take place *in Canada*; that stipulation would be dropped by the bill.

CRIMES INSIDE CANADA	CRIMES OUTSIDE CANADA
All Permanent Residents and Foreign Nationals: Conviction of an offence under an Act of Parliament which carries a maximum term of 10 years or more in prison OR having received a prison sentence of more than 6 months.	All Permanent Residents and Foreign Nationals: Conviction of an offence outside Canada that, if committed in Canada, would be an offence under an Act of Parliament which carries a maximum term of 10 years or more in prison. Rehabilitation possible.
	Commission of an *act* outside Canada that was an offence where it was committed, and if committed in Canada, would be an offence under an Act of Parliament which carries a maximum term of 10 years or more in prison. Rehabilitation possible.
For Purposes of Refugee Protection: Conviction of an offence under an Act of Parliament which carries a maximum term of 10 years or more in prison AND having received a prison sentence of at least 2 years. Note: currently, there is no reference to a prison sentence and the person must be declared to be a danger to the public in Canada in order to be ineligible to make a refugee claim or be deported.(24)	For Purposes of Refugee Protection: Conviction of an offence outside Canada that, if committed in Canada, would be an offence under an Act of Parliament which carries a maximum term of 10 years or more in prison. Rehabilitation possible. Note: there must currently be a "danger to the public in Canada" assessment.

Criminality: For non-permanent residents, the foregoing standards would apply, as would the less serious criminality standards below.

(24) "Danger to the public" would be relevant to the deportation of a *recognized* refugee. See clause 115.

CRIMES INSIDE CANADA – FOREIGN NATIONALS	CRIMES OUTSIDE CANADA – FOREIGN NATIONALS
Conviction of an offence under any Act of Parliament punishable on indictment (even if prosecuted summarily) or two separate summary offence convictions.	Conviction of an offence that, if committed in Canada, would be an indictable offence under any Act of Parliament or two unrelated offences that would be summary conviction offences under an Act of Parliament. Rehabilitation possible.
Commission, *on entering* Canada, of a prescribed offence under an Act of Parliament. (This is a new provision.[25])	Commission of an *act* that was an offence where it was committed, and if committed in Canada, would be an indictable offence under an Act of Parliament. Rehabilitation possible.

The term "rehabilitation possible" in the above charts means that the Minister would have the power to decide that the person had been rehabilitated after a prescribed period, or was a member of a prescribed class that was deemed to have been rehabilitated.

Organized Crime: Belonging to a group engaging in organized crime would continue to be grounds for inadmissibility. New to the description of what constitutes organized crime would be engaging in transnational people smuggling, trafficking in persons, or money laundering. The Minister would have the power to admit such people if satisfied that admission would not be detrimental to the national interest. The power could not be delegated. A new provision would ensure that the people brought to Canada as a result of organized crime would not on that count alone be considered inadmissible. This reflects the view that many of those who are "trafficked" are in fact victims.

(25) This could cover a limited number of offences committed at the border, for which an officer could immediately exclude a person. Currently, the officer must let the person in and begin removal proceedings. A drunk driver appearing at the border, for example, could be immediately turned around if that offence were prescribed.

Health: The current grounds would continue. People would be inadmissible if they were likely to be a danger to public health or public safety, or might reasonably be expected to place excessive demand on health or social services. Permanent residents could not be removed on these grounds. Bill C-11 creates exceptions to the "excessive demand" rule that are new from Bill C-31 and new to the current Act. The rule would not apply to any foreign national who:

- was a member of the family class and was either the spouse, common-law partner or child of a sponsor;
- had applied abroad for a permanent resident visa as a Convention refugee or a person in similar circumstances;
- was a protected person; or
- was, where prescribed in the regulations, the spouse, common-law partner, child or other family member of any of the foreign nationals described in the above three groups.

Financial Reasons: The current grounds would continue. People would be inadmissible if unable or unwilling to support themselves or their dependants without relying on social assistance. Permanent residents could not be removed on these grounds.

Misrepresentation: Currently, a permanent resident can be reported if landing was granted by means of improper documents, or by "means of any fraudulent or improper means or misrepresentation of any material fact." The bill simplifies this provision, and perhaps expands it somewhat, by stating that a permanent resident or foreign national would be inadmissible who, directly or indirectly, made a material misrepresentation, or withheld relevant information that led (or could have led) to an error in administering the Act. Where a sponsor had made the misrepresentation, the Minister would have some discretion in the matter. A refugee whose status had been vacated for misrepresentation would also come under this ground of inadmissibility, which would remain in force for a two-year period. Bill C-11 includes a ground of inadmissibility that exists in the current law, but was missing from Bill C-31: loss of citizenship for fraud or misrepresentation under the *Citizenship Act*.

Non-Compliance with the Act: A foreign national, except for a permanent resident, would be inadmissible for contravening any provision of the Act. Permanent residents would only become inadmissible under this general provision for failing to meet the physical presence requirements or failing to comply with any prescribed conditions.

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Clause 42 would change the existing treatment of family groups. If accompanying dependants (or in prescribed cases, non-accompanying dependants) were inadmissible, the whole group would be inadmissible. In the House Committee, this provision was amended to ensure that refugees or other protected persons would not be inadmissible because one of their family members was inadmissible.

Regulations could be made relating to any of the above inadmissibility clauses, including definitions. They could also provide for the circumstances in which a class of foreign nationals would be exempted from any of the inadmissibility provisions.

E. Division 5, Loss of Status and Removal (Clauses 44-53)

1. Report on Inadmissibility

Whereas the current Act is a complex web of reports and distinctions, the bill states simply that if an immigration officer was of the opinion that a foreign national in Canada was inadmissible, he or she would prepare a report and transmit it to the Minister (who would, of course, delegate its receipt).

If the Minister considered the report to be founded, an admissibility hearing would be held before the Immigration Division of the Immigration and Refugee Board or, in cases prescribed by the regulations, a removal order could be made immediately with respect to foreign nationals. The House Committee amended this clause (44(*2*)) to ensure that removal orders for permanent residents could not simply be made by an immigration officer, except in the case of permanent residents who did not comply with the residency requirement set out in clause 28. Such permanent residents would be able to appeal the removal order before the Immigration Appeal Division of the Immigration and Refugee Board. Immigration officers may currently make removal orders under certain circumstances; it remains to be seen whether that power would be broadened under the new Act.

New from Bill C-31 is the mention in Bill C-11 that an officer of the Immigration Division would be able to impose *any* condition considered necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, if in Canada, a removal order. This is in addition to the broad regulation-making powers set out in clause 53. In the House Committee, an amendment was made to explicitly clarify that possible conditions could include the payment of a cash deposit or the posting of a guarantee to secure compliance

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with other conditions. The government proposed this amendment to ensure that alternatives to detention would be considered.

2. Admissibility Hearing by the Immigration Division

The current Adjudication Division of the Immigration and Refugee Board would be renamed the Immigration Division, and "inquiries" would be renamed "admissibility hearings." The admissibility hearing could authorize entry as a citizen, a permanent resident, or a temporary resident, or could issue a removal order.

The admissibility hearing is covered in one short clause (clause 45), which does not mention the name of the officers, currently called adjudicators, who would preside over it. Procedural matters and the rights of the parties are all covered under Part 4 of the bill.

3. Loss of Status

Clauses 46 and 47 deal with the loss of permanent resident and temporary resident status. Permanent resident status would be lost under the following conditions:

- when a person became a citizen;
- once a final determination had been made on a decision made outside Canada that a person had not met the residency requirements under clause 28 (Bill C-31 would not have restricted this condition to decisions made outside Canada);
- once a removal order came into force;
- (for refugees) when their status had been finally determined to be vacated; and
- (for temporary residents) when the authorized period of time in Canada expired, when the conditions of stay had been violated, or when a permit was cancelled.

Bill C-31 would have explicitly required officers assessing the residency requirements to take into account all humanitarian and compassionate considerations, including those relating to affected children. In Bill C-11, this stipulation has been moved from the loss of status provisions directly to clause 28 where it would now apply to the residency assessment in general. Also new from Bill C-31 is the mention in Bill C-11 that persons who lose their Canadian citizenship for reasons other than misrepresentation related to their previous permanent resident status would revert to being permanent residents. This would allow the government to determine if further enforcement action would be required with respect to such persons.

4. Enforcement of Removal Orders

A removal order would be enforceable, if it was not stayed, on the latest of the following dates:

- the day the order was made, if there was no right of appeal;
- the day the appeal period expired, if there was an appeal right and no appeal was made; and
- the day of the final determination of the appeal, if an appeal was made.

As they do now, refugee claimants would receive conditional removal orders, which would become enforceable shortly after the claimant had been found to be ineligible to make a claim, or when the claim and any appeal had been finalized. Thus, there would be no automatic stay of a removal order if a refused claimant applied for judicial review.(26)

As in the current law, there would be a requirement for a removal order to be enforced as soon as was reasonably practicable. As now, persons concerned could seek a stay of the order from the court; the Minister would have to be given the opportunity to make submissions. Under Bill C-31, the Minister could have specified certain countries for which removal orders could have been stayed temporarily. This power is not present in Bill C-11, but could still be included in regulations. Any such list would likely mirror the current informal short list of countries to which Canada will not normally deport people, and might include other countries known to produce refugees. Also different from Bill C-31, the removal order of a foreign national sentenced to a prison term in Canada would be stayed until the sentence was completed.

As is currently the case, individuals who had been subject to an enforceable removal order could not re-enter Canada without permission, and without paying the costs of the removal (to be established by regulation). Where a person who had no right to appeal the order had been removed from Canada and the order had then been set aside on judicial review, the person would have the right to return to Canada at the expense of the Minister.

5. Regulations

As in the rest of the bill, regulations could be made relating to any matter in the above section. One looks in vain for a description of different kinds of removal orders, similar to

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(26) Currently there is a stay for judicial review, except in a few specified cases.

that in the current Act. It is likely that the general and specific powers of clause 53 would be used for this purpose.

F. Division 6, Detention and Release (Clauses 54-61)

With some exceptions, Bill C-11 would continue the policy of the current law on detention. There would be a power to detain at a port of entry for administrative reasons, i.e., if an officer considered it necessary to do so for the examination to be completed. Detention could also commence at the port of entry for those suspected of being inadmissible on grounds of security or violating human or international rights. This would be similar to the current law.

The major grounds for detention would continue to be that a person: posed a danger to the public; was unlikely to appear for procedures under the Act (in particular, under Bill C-11, an examination, an admissibility hearing, removal from Canada, or, as amended by the House Committee, a proceeding that could lead to a removal order under clause 44(2)); or could not satisfy the officer of his or her identity. Once a foreign national was detained, the officer would have to immediately notify the Immigration Division. The current structure of review would continue. An officer could order release before 48 hours; at the 48-hour point or shortly thereafter, the Immigration Division would review the reasons for the detention. A review would be conducted after seven days, and then once during every 30-day period. Under the current system, people detained for identity and security/human rights reasons have a review every seven days, with no provision for switching to every 30 days.

The House Committee amended clause 56 to state that the officer, when ordering release, could impose any conditions he or she considered necessary, including, as with the inadmissibility report under clause 44, the payment of a cash deposit or the posting of a guarantee to secure compliance with other conditions. A similar amendment was also made by adding a new clause 58(3) to ensure that the Immigration Division of the Immigration and Refugee Board could impose such conditions when ordering release.

References to "cooperation" by detainees would be introduced for those detained because of their failure to provide identification. Persons would have to be released unless the Immigration Division found that:

- they were a danger to the public;
- they were unlikely to appear for examination, an admissibility hearing, removal from Canada, or, as amended by the House Committee, a proceeding that could lead to a removal order under clause 44(2);

- the Minister was inquiring into their possible inadmissibility on grounds of security or violating human or international rights;
- the Minister was of the opinion their identity had not been, but might be, established AND the person *had not reasonably cooperated* with the Minister by providing information relevant to establishing their identity; or
- the Minister was making reasonable efforts to establish their identity.

These provisions would put strong pressure on unidentified individuals to cooperate by providing relevant information to assist officials.

New from Bill C-31 is the statement in Bill C-11 that minor children would be detained only as a last resort, taking into account the other applicable grounds and criteria including, as amended by the House Committee, the best interests of the child.

The background materials to the bill state that the criteria for detention decisions will be established in the new regulations. Currently, there are no regulations governing detention, although both the Department and the Immigration and Refugee Board have developed detention guidelines. The bill provides that regulations could be made governing the conditions of release, and the grounds and criteria regarding release. Any special rules regarding minor children could also be developed.

G. Division 7, Right of Appeal (Clauses 62-71)

As in the current law, certain groups would have full appeal rights to the Immigration Appeal Division against a decision or a removal order, while for others, these rights would be restricted or eliminated.

In general, sponsors of family class members would be able to appeal a refusal; permanent residents and people who have been protected as refugees would be able to appeal a removal order, as would people who had lost their permanent status. The Minister could also appeal any decision of an admissibility hearing.

The Appeal Division could allow an appeal if it was satisfied that:

- the decision appealed was wrong in law or fact or mixed law and fact;
- a principle of natural justice had not been observed; or
- other than with a Ministerial appeal, having taken into account the best interests of a child directly affected by the decision, humanitarian and compassionate grounds warranted allowing the appeal.

As well, the Appeal Division could stay a removal order only if it was satisfied, taking into account the best interests of a child directly affected, that humanitarian and compassionate considerations warranted a stay in light of all circumstances of the case. If the removal order was not stayed or the appeal not allowed, the appeal would be dismissed. New from Bill C-31, for Ministerial appeals concerning permanent residents or persons protected as refugees, the Division could make and stay the applicable removal order or dismiss the appeal, even if satisfied the decision appealed was wrong in law or fact, or a principle of natural justice had not been observed.

Also new from Bill C-31, permanent residents could only appeal decisions made *outside Canada* on the residency requirement for permanent residents. Although Bill C-31 did not limit this appeal to decisions made outside Canada, it would only have allowed a paper appeal with no hearing. Bill C-11, in clause 175(1)(a), would require a hearing to be held for such appeals. However, Bill C-11 also explicitly states in clause 69(3) that if such an appeal was dismissed and the person was in Canada, the Division would have to make a removal order.

It is important to note the following:

- The Appeal Division could consider humanitarian and compassionate factors only if convinced that the individuals were sponsors and members of the family class within the meaning of the regulations. This would clarify the current provisions. Sponsors rejected because of inadmissibility based on misrepresentation could appeal only if the misrepresentation concerned a spouse, common-law partner or child.

- No appeals would be allowed if the reason for the inadmissibility related to security, violating human or international rights, serious criminality in Canada for which a prison term of two years or more had been imposed, or organized criminality. This would be more restrictive than the current conditions. (The bill describes the criteria for each of those terms in Division 4.)

- As is now the case, individuals who had been the subject of a security certificate that had not been quashed by the Federal Court would not proceed to an admissibility hearing and would have no appeal.

The restriction of appeal rights on the basis of serious criminality would mark a significant departure from the current system, which dates from 1995 when Bill C-44 came into force. Currently, permanent residents who have been convicted of an offence carrying a maximum period of imprisonment of ten years or more are not allowed to appeal to the Appeal Division if the Minister files an opinion stating that the person is a danger to the public in Canada. The administrative process for reaching that decision begins in local offices, and the decision is made centrally in Ottawa. It involves weighing a number of factors concerning the

crime, the circumstances and the offender. That process would be replaced by the objective fact that a person had been sentenced to prison for two years or more.

Another significant departure from the current law would be the elimination of the right of appeal to the Appeal Division for those inadmissible on grounds of security, organized crime, and violating human or international rights. Currently, unless there has been a security certificate, these individuals have full appeal rights.

The Immigration Appeal Division could re-open an appeal only on the basis that it had failed to observe a principle of natural justice and only if the person were still in Canada. New evidence would therefore not justify a re-opening.

H. Division 8, Judicial Review (Clauses 72-75)

Judicial review by the Federal Court would continue for all matters that arose under the Act. Currently, matters involving the decisions of visa officers overseas do not require leave of the court to bring an application. This would be changed so that all applications for judicial review would require leave. The time to provide notice of a judicial review application to the other party would be raised from 15 to 60 days for matters arising outside Canada.[27] Other than these two exceptions, the rules regarding applications for leave to commence an application for judicial review, and the review, would be virtually identical to the current law.

It is important to note that individuals (including the new categories described above) who would be denied the right to appeal a removal order would continue to have the right to make an application for judicial review, with leave of the court.

I. Division 9, Protection of Information (Clauses 76-87)

1. Examination on Request by the Minister and the Solicitor General of Canada

The law currently contains provisions for dealing with removal cases involving sensitive material that the government wishes to keep entirely or partly confidential. In these cases, the Solicitor General and the Minister of Citizenship and Immigration jointly make either a report or sign a certificate alleging that the person is inadmissible and stating the grounds. In the case of a permanent resident, the report is referred to the Security Intelligence Review Committee, which investigates the grounds upon which it is based, and then reports its findings

(27) Both the current law and Bill C-31 set the limit at 15 days for all matters, whether within or outside Canada.

to the Governor in Council. The latter then directs the Minister to issue a certificate (if in agreement with the report) and the person becomes removable.

For non-permanent residents, the Solicitor General and the Minister sign a certificate, which is referred to the Federal Court for review by either the Associate Chief Justice or a designated judge, who may uphold the certificate or quash it. Confidentiality requirements are established in each type of proceeding. The subject of the proceedings may be excluded and receives a summary of the evidence.

Bill C-11 would eliminate the differences in procedure between permanent residents and others. Permanent residents and foreign nationals would have a jointly signed certificate reviewed by the Federal Court. Thus, the Security Intelligence Review Committee (SIRC) would no longer automatically be involved.[28] Most of the provisions governing the procedure would be the same as under the current law, although the proceedings could be suspended on the request of the Minister, the permanent resident or the foreign national to allow the Minister to complete a refugee-related pre-removal risk assessment under clause 112(1).[29] A new provision would instruct the judge to deal with all matters informally and as expeditiously as would be consistent with fairness and natural justice.

2. Detention

A person named in the certificate noted above who was a permanent resident could be detained if the Ministers had reasonable grounds to believe he or she was a danger to national security, or to the safety of persons, or would be unlikely to appear. Non-permanent residents named under a certificate would have to be detained.

A judge would review the detention of a permanent resident within 48 hours, and at six-month intervals thereafter, or more frequently should the judge allow. The current law would continue for others in detention under these circumstances. They could apply to the Minister for release to permit departure from Canada, or could apply to the judge if they were not removed within 120 days after the Federal Court had found the certificate reasonable. The judge

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(28) Permanent residents could still request an SIRC review of the background security check that led to the security certificate.

(29) This differs from Bill C-31, which would have explicitly allowed the "danger opinions" the Minister would have had to provide regarding the deportation of a refugee to have been combined with this security certificate proceeding. A "danger opinion" is an opinion provided by the Minister in relation to a particular person when the Department possesses evidence suggesting that person is a danger to the public.

could then order release if removal was not in sight, and the person was thought not to pose a danger to national security or to the safety of any person.

3. Consideration during an Admissibility Hearing, Detention Review, Immigration Appeal, or Judicial Review

The current confidentiality provisions applying to hearings of the Immigration Appeal Division, detention reviews, and specified judicial reviews would be consolidated; to them would be added confidentiality rules regarding admissibility hearings. (Currently, there are no such provisions for inquiries.) In each case, the Minister could make an application for the non-disclosure of information. The same rules would apply, with any necessary changes the circumstances might require, as for the Federal Court certificate process, with the exception that the presiding officer of the proceeding would perform the functions of the judge. In judicial review proceedings, the judge would not be required to provide a summary to the person concerned, presumably because the record relating to the decision would already have been provided to the person.

J. Division 10, General Provisions (Clauses 88-94)

This Division would continue the existing provisions whereby loans can be made, with regulations to govern the purposes for which they could be made and who would be eligible.[30] The power to make regulations governing fees for services provided in the administration of the Act would be new from Bill C-31.

The issuance of social insurance number cards identifying individuals required to obtain permission to work in Canada would continue.

Another new aspect, that was not in Bill C-31, would be the ability to make regulations about who may or may not represent, advise or consult with someone who is the subject of a proceeding before the Minister, an officer or the Immigration and Refugee Board.

Clause 92 would permit the incorporation by reference of material produced by a person or body other than the Governor in Council as permitted by the Act. This material

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(30) The current regulations allow for immigration-related loans to be made to foreign nationals to pay for transportation costs to come to Canada, admissibility and resettlement assistance, and for the right of landing fee.

would not itself become a regulation. It could include, for example, external standards for evaluating educational attainment or professional qualifications.

Finally, as is the case now, the Minister would be required to submit a report to Parliament by 1 November of each year. The report would be a combination of an annual report and what is currently called the "Levels Report," concerning projected immigration levels for the coming year. For the preceding year, information would be presented concerning:

- the number of foreign nationals selected in the various categories;
- the linguistic profile of foreign nationals who became permanent residents (as amended by the House Committee);
- details of the agreements with provinces;
- the number of temporary resident permits issued;
- the number of people allowed by the Minister to be landed on humanitarian and compassionate grounds, taking into account the best interests of a child affected, or public policy grounds; and
- a gender-based analysis of the impact of the Act (as amended by the House Committee in response to the submissions of many witnesses).

PART 2: REFUGEE PROTECTION

A. Division 1, Refugee Protection, Convention Refugees and Persons in Need of Protection (Clauses 95-98)

This Division begins with definitions: "refugee protection," "protected person," "Convention refugee," and "person in need of protection." The definition of "Convention refugee" would not change. "Refugee protection" is the umbrella term to describe the protection given to the different kinds of people who would be protected under the Act; in the current Act, only "Convention" refugees are recognized. A "protected person" would be someone who had received refugee protection, and whose claim or application had not subsequently been rejected or vacated.

A "person in need of protection" could be a member of a class prescribed in regulations, or as described in the Act. With one addition, that definition would mirror very closely the current definition of "member of the post-determination refugee claimants in Canada

class." This class provides refugee claimants who have failed to be recognized as Convention refugees by the Immigration and Refugee Board an opportunity to apply to the Department for consideration on general grounds relating to risk.

The equivalent definition in the current regulations of "person in need of protection" would be expanded in the bill by a reference to those who, there were substantial grounds to believe, would face the danger of torture should they be returned to their country of origin. Even with that addition, the criteria would remain very stringent. The individual would have to be subject to a risk to his or her life, or to a risk of cruel and unusual treatment or punishment. However, the risk would have to be *personal* to that individual (in the sense that others in the country would not generally face the same risk), and would have to be faced in *every part of the country*. It could not be tied to the imposition of lawful sanctions unless those were beyond what were accepted internationally ("persecution not prosecution"), and could not be related to the inability of the country of origin to provide adequate health or medical care. These criteria as applied by departmental officials have led to a very low acceptance rate.

Adding those "in need of protection" to the Convention refugee definition would be necessary in order to consolidate most of the decisions relating to risk at the Immigration and Refugee Board. This approach has been supported by many commentators on the system, including the Standing Committee on Citizenship and Immigration in its two reports preceding its study of Bill C-11. Thus, although it might appear that the definition of "refugee" would be expanded, in fact the existing mechanisms that have been available to refugee claimants for some time would be consolidated.

B. Division 2, Convention Refugees and Persons in Need of Protection (Clauses 99-111)

1. Claim for Refugee Protection

Claims to refugee protection could, as now, be made outside or inside of Canada. In the former case, the claim would be treated as an application for immigration and treated under Part 1. An in-Canada claim could be made as long as the person was not subject to a removal order. Such a claim would be referred to the Immigration and Refugee Board; if successful, the individual would become a "protected person" and would (as now) be eligible to apply for permanent resident status under Part 1.[31] The provisions of Part 1 would cover, for

(31) Presumably, some classes of people would continue to be ineligible to apply for permanent residence

example, such matters as detention, the definitions relating to inadmissibility (security, serious criminality, etc.) and the certificate process, all described above.

With the addition of clause 21(2) by the House Committee, some protected persons would automatically become permanent residents following final determination of their status by the Immigration and Refugee Board. This would not apply to persons found inadmissible on grounds of security, human or international rights violations, serious or organized criminality, or health.

2. Examination of Eligibility to Refer Claim

The concept of eligibility to make a refugee claim would be retained, and would remain the jurisdiction of departmental officials. In an effort to speed up the process, the officer would be required to make a decision within three working days after receipt of a claim.[32] After that time, if the officer had not found the person ineligible, or suspended consideration because an adverse report had been referred to the Immigration Division for determination or because the person had been charged with a serious crime,[33] the claim would be deemed to have been referred to the Refugee Protection Division (the former Refugee Division) of the Immigration and Refugee Board.[34]

With an important exception, the ineligibility criteria would remain essentially the same. Thus, those who would continue to be ineligible to make a refugee claim would include:

- claimants already recognized elsewhere (and returnable there) and in Canada;
- those previously found to be ineligible or who had abandoned or withdrawn their claims;[35]
- those coming from prescribed ("safe") countries; and
- those inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, but, as amended by the House Committee, this would not include those inadmissible because they were subject to international travel sanctions with which Canada had concurred.

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(32) Bill C-31 merely referred to a "prescribed period"; Bill C-11 specifies three days.

(33) Holding up the eligibility determination for a claimant charged with an offence carrying a maximum penalty of ten years or more would be new.

(34) The "deeming" language seems odd. The information relating to the claim would still have to be physically (or electronically) transferred to the Board.

(35) Adding those who withdraw their claims would be new.

Claimants presenting second claims after being refused and leaving Canada must now wait 90 days. Under the bill, they would not have access to the Board, but would be allowed only a pre-removal risk assessment by departmental officials, and only after being out of the country for six months.

With regard to ineligibility on grounds of serious criminality, currently the Minister must provide an opinion that the person presents a danger to the public in Canada. That would be lost under the new Act with respect to convictions *in* Canada. A claimant would in future be ineligible if he or she had been convicted in Canada of an offence punishable by a prison term of ten years or more AND the sentence imposed had been more than two years (regardless of the circumstances); if, however, an offence had been committed abroad, it would have to be equivalent to a Canadian offence with a maximum sentence of ten years or more in prison *AND* the Minister would have to provide a "danger opinion."

As in the current Act, regulations could prescribe "safe" third countries to which claimants could be returned.(36) With the exception of a new reference to countries party to and respecting the Convention Against Torture, the factors that the Governor in Council would have to take into account in prescribing a list would remain the same.

3. Suspension or Termination of Consideration of Claim

Under the current Act, the concept of ineligibility is ongoing only with regard to criminality. Under the bill, a claim could be stopped in the Refugee Protection Division or the Refugee Appeal Division for any reason relating to ineligibility if: a report had been made to the Immigration Division regarding ineligibility on grounds of security, serious criminality, etc.; or the person had been charged with a serious crime. Material misrepresentation or withholding information relevant to eligibility would also stop a claim in the Refugee Protection Division. Generally, where the claim was found to be ineligible, the proceedings would be terminated.

As happens now, in the case of multiple claims by the same person, a later claim would not be considered, or consideration would be stopped; only the decision on the first claim would be valid.

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(36) Note that since its inception in the law in 1989, no list has been prescribed.

4. Extradition Procedure

Extradition proceedings with respect to an offence under Canadian law carrying a maximum sentence or ten or more years of imprisonment would take precedence over a refugee claim. If an order of surrender were made, the person would be deemed to have had a refugee claim rejected on the basis that he or she had committed a serious non-political crime prior to admission.(37) No refugee claim would be permitted once the order of surrender had been made. Any review of the decision would be taken under the *Extradition Act*.

5. Claimant Without Identification

It was noted above that claimants who did not cooperate in establishing their identity would likely be detained. Once the claim reached the Refugee Protection Division, the Division would be required to consider the question of documentation. Claimants who did not possess documentation establishing their identity, had not taken reasonable steps to obtain it, and could not reasonably explain the situation to the Division, would have those facts taken into account when the Division assessed their credibility. While refugees and asylum-seekers may be unable to obtain valid documents because of a well-founded fear of persecution by the issuing authorities in their country of origin, the intention of this provision would be to provide measures to deter the deliberate and unfounded destruction of documents and the problematic practice of trying to conceal a true identity.

6. Decision on Claim for Refugee Protection and Cessation of Refugee Protection

As happens now, if the Division found that there was no credible basis for the refugee claim, this fact would have to be stated in writing. There would be no legal consequences to this statement (as there are currently), but administratively such information could indicate to officials that the case should be a priority for removal.

Cessation of protection is currently a matter for which the Minister must bring an application to the Division. Under Bill C-11, the Division itself would be required to reject a claim under the cessation criteria, which would remain the same.(38) The concept would seem to

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(37) See the Schedule to the bill, which contains the exclusion clauses of the Refugee Convention. Section F(b) of Article 1, relating to a serious non-political crime, would be the applicable provision.

(38) In the current Act, they are found at section 2(2).

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be that the Division *would have* found the person to be a refugee, had that status not ceased. The Minister would continue to have the right to bring a cessation application at any time following refugee recognition; if the application was successful, the person's claim would be deemed to have been rejected.

7. Applications to Vacate

Currently, the Minister must make an application to the Chairperson of the Board to bring an application to vacate a refugee status. Under the bill, the application would be as of right. The criteria would be the same, except that references to "fraud" would be dropped. This does not seem significant in view of the presence of the words "directly or indirectly misrepresenting or withholding material facts relating to a relevant matter." The bill is silent on the quorum needed to hear such applications, which is currently three members; however, it should be noted that under clause 163, the quorum for matters before the Refugee Protection Division would be one unless the Chairperson of the Board decided it should be three.

8. Appeal to Refugee Appeal Division

Since the design of the refugee status determination system in the mid-1980s, refugee advocates have been extremely critical of its lack of an appeal mechanism. The bill would introduce a new section to the Board, the Refugee Appeal Division, whose mandate would be to determine appeals from either refused claimants or the Minister.[39] The grounds would be wide: law, fact, or mixed law and fact. On the other hand, the appeal would not consist of a hearing but would be based on the record of the proceedings of the Refugee Protection Division and any submissions. New from Bill C-31 is the mention in Bill C-11 of who may make such submissions:

- the Minister;
- the person whose claim is at issue;
- a representative of the United Nations High Commissioner for Refugees; and
- anyone else described in the rules of the Board.

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(39) Claimants whose claims had been determined to be abandoned or withdrawn could not appeal.

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In the House Committee, clause 110 was amended to make explicit that the Minister would have the right to appeal Refugee Protection Division decisions to reject an application for cessation or vacation of refugee status.

The Refugee Appeal Division could:

- confirm the original decision;
- substitute its own opinion (except if it believed a hearing was required or the appeal had been brought by the Minister and was based on the claimant's credibility); or
- refer the matter back to the Refugee Protection Division for a re-determination, together with any directions it considered appropriate.

C. Division 3, Pre-Removal Risk Assessment (Clauses 112-116)

1. Protection

With exceptions and limitations, and in accordance with the regulations, individuals under an enforceable removal order or named in a security certificate could appeal to the Minister for protection.[40] The exceptions would be people for whom the surrender decision had been made under the *Extradition Act*, those ineligible to have their refugee claims determined because they could be returned to a safe third country, those who had not left Canada since the application for protection was rejected and the prescribed period had not expired,[41] and those who had not left Canada since the removal order came into force and the prescribed period had not expired.

The House Committee amended clause 112 to ensure that protected persons whom the department may wish to remove for serious criminality reasons under clause 115 would not be eligible for a pre-removal risk assessment.

Those found ineligible on other grounds, or whose claim had been abandoned, withdrawn or rejected, and who had left Canada and then returned, would have to wait six months for the review.[42] This would be a significant change from the existing law, which

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(40) This would be important because individuals under a removal order cannot make a refugee claim under the current law.

(41) This amendment proposed by the government was made by the House Committee to prevent multiple pre-removal risk assessment claims by individuals seeking to delay their removal from Canada.

(42) Under Bill C-31, the person would have had to wait one year.

permits those who leave Canada a second claim 90 days after the first. The bill would allow only the pre-removal risk assessment application; for those whose refugee claims had been rejected before, only new evidence that had arisen after the rejection, that had not been reasonably available at the time of the first hearing, or that the applicant could not reasonably have been expected in the circumstances to have presented,[43] would be received. There would be no hearing unless the Minister decided one was necessary. Successful applicants in these categories would be allowed to apply for permanent residence.

Individuals found inadmissible on grounds of serious criminality would be assessed on the danger they posed to the public in Canada. Individuals who had been found ineligible on the grounds of security, violating human or international rights, or organized criminality, or who had been excluded from the protection of the Refugee Convention for serious reasons (see the Schedule to the bill), would be assessed on the nature and severity of the acts they committed, and the danger they constituted to the security of Canada. If relief were granted in these situations, it would be by way of a stay of the removal order. Thus the person could be removed at a later time if country-of-origin circumstances changed.

The House Committee removed the element of national interest from the balancing provisions in the pre-removal risk assessment in response to criticisms by commentators that it is vague and imprecise. Had it remained, it would have been the *second* time the national interest would have been weighed for people found inadmissible on grounds of security, violating human or international rights, or organized criminality. This is because the national interest test would be part of those inadmissibility grounds in Part 1, Division 4.

New from Bill C-31, Bill C-11 adds that if the Minister was of the opinion the application was successful because of direct or indirect misrepresentation or withholding material facts, the decision could be vacated and nullified, which would mean it had been deemed to have been rejected.

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(43) This expansion on the evidence that could be presented was made in the House Committee in response to comments from numerous witnesses that for cultural, personal or other reasons (such as the situation of an abused spouse), applicants might have been unable to present all relevant evidence at their initial hearing.

2. Principle of Non-refoulement

Clause 115 would state the central principle of the *Convention Relating to the Status of Refugees*, that of non-refoulement (non-return) to a country where a person fears persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion. To these reasons would be added the risk of torture or cruel and unusual treatment or punishment. As in the current law, that principle would not prevent the removal of certain groups: serious criminals who posed a danger to the public in Canada; or those inadmissible on grounds of security, violating human or international rights, or organized criminality if the Minister was of the opinion they should not remain, taking into account the nature and severity of the acts they had committed and the danger to the security of Canada. Again, and for the same reason as above under the pre-removal risk assessment, the House Committee removed the national interest test from the balancing provision for those inadmissible on grounds other than serious criminality. Regulations would govern the making of these applications. In the House Committee, the regulation-making power was expanded to include regulations pertaining to decisions made under the non-refoulement provisions, including the establishment of factors to determine whether a hearing would be required.

PART 3: ENFORCEMENT

A. Human Smuggling and Trafficking (Clauses 117-121)

The existing offence of organizing the entry into Canada of people without the required documents would be retained, with higher penalties. The House Committee amended the provision by adding to those who "knowingly organize," those who "induce, aid or abet" the coming into Canada of people illegally. This simply maintains the offence as it is described in the current Act. For those convicted on indictment of smuggling under ten people, the maximum fine would increase to $500,000 (from $100,000) and/or the maximum jail term would rise to ten years (from five). A new provision would raise the maximum penalties for conviction on a subsequent offence to $1 million and/or 14 years in prison. Summary conviction penalties would also be increased.

For smuggling groups of ten or more people, the maximum fine would rise to $1 million and/or life in prison. As in the current law, the consent of the Attorney General of Canada would be required to institute a prosecution (although the requirement that this consent be "personal" and "written" would be dropped).

A new offence would cover "trafficking in persons." It would prohibit bringing people to Canada by means of threat, force, abduction, fraud, deception or coercion. Those who received or harboured the individuals would also commit the offence. Disembarking people at sea would continue to be an offence. The House Committee amended this provision to clarify that not only the "person in charge of a ship" or a "member of the crew," but also anyone else who participated in disembarking persons at sea, would be subject to prosecution.

A new provision would provide a list of aggravating factors for the court to take into account in sentencing under these provisions. The following such matters would all be relevant to the severity of the sentence:

- the degree of harm, including death;
- criminal organization;
- a profit motive; and
- the treatment of the people, including matters relating to their health or to sexual exploitation.

B. Offences Related to Documents (Clauses 122-123)

The offences relating to documents would be clarified and expanded, and serious penalties imposed. Aggravating factors would be prescribed for sentencing: whether the commission of the offence was connected to a criminal organization, and whether the offence was committed to gain profit.

C. General Offences (Clauses 124-129)

The bill would continue the general offences of escaping custody or detention, employing a person who is not authorized to work, making a material misrepresentation, and refusing to answer questions, as well as the offences relating to malfeasance by officers or federal government employees in the performance of their duties; however, the penalties would for the most part be significantly increased. The offence of counselling misrepresentation, currently limited to the making of refugee claims, would also be included here.

D. Proceeds of Crime (Clauses 130-132)

New provisions would prohibit the possession of any property or proceeds that had been obtained by the commission of the major offences of the Act, such as those relating to

smuggling and trafficking, documents, misrepresentation, etc. Also prohibited would be the possession of the proceeds of money laundering relating to those offences. Originally, officials involved in "sting" operations would have been protected under the bill. This provision was removed in the House Committee because the same protection would be provided to peace officers under the recently tabled Bill C-24, An Act to amend the Criminal Code (organized crime and law enforcement).

E. Prosecution of Offences (Clauses 133-136)

As is the case now, for people claiming refugee status in Canada who came "directly or indirectly" from the country from which they claimed persecution, prosecution for offences relating to their entry and examination would be deferred, and successful claimants would not be prosecuted. The words "or indirectly" would be new.

F. Forfeiture (Clause 137)

This clause would permit a court that convicted a person of an offence to order the forfeiture of any related property. Regulations would be made covering matters that occupy numerous provisions of the current Act.

G. Officers Authorized to Enforce Act (Clauses 138-141);
Peace Officers (Clauses 142-143)

These clauses would provide enforcement officers with the powers to carry out their duties, including the power to search people and their effects, seize objects and means of transportation, administer oaths, etc. A certain number of officers would also be peace officers, with the authority to execute warrants and make arrests. Bill C-31 included the power to require proof of identity and examine documents; these powers are missing in Bill C-11.

H. Ticketable Offences (Clause 144)

Proceedings relating to offences prescribed by the regulations could be commenced by a ticket under procedures established in this clause and in the regulations. Bill C-31 would have set the maximum amount of a fine at $1,000; Bill C-11 would raise it to $10,000.

I. Debts Due to Her Majesty and Collection (Clauses 145-147)

These clauses provide mechanisms whereby the Minister could collect debts owing to the government, including by way of garnishment. These provisions could facilitate the collection of money owing by defaulting sponsors.

J. Transportation Companies (Clauses 148-150)

Measures relating to transportation companies that occupy pages in the current Act would be reduced to three clauses in the new law. As a result of this change, the regulations would be extensive and could: enable terms to be defined; enable the requirements and procedures applicable to the companies to be spelled out; and specify elements relating to the ownership and operation of a vehicle. A new provision in the bill would require transportation companies to provide prescribed passenger information to officers to be used to identify passengers for whom there was a warrant for arrest.[44] Passengers would have to be notified of any information that had been passed on.

PART 4: IMMIGRATION AND REFUGEE BOARD

A. Composition of Board (Clauses 151-156)

As will have been evident from the description above of certain provisions of the bill, the Immigration and Refugee Board would be expanded and most of its Divisions renamed. The Adjudication Division would become the Immigration Division, the Refugee Division would become the Refugee Protection Division, and the new appeal body would be called the Refugee Appeal Division.

Members would continue to be appointed by the Governor in Council; those in the Immigration Division would continue to be public-service workers. A new power of the Governor in Council would be the ability to assign members – other than those in the Immigration Division – to a regional or district office. New to the law would be a provision requiring members not to hold any office or employment inconsistent with their position. New also would be civil and criminal immunity for members' actions taken in the course of their duties, and the fact that they would not be competent or compellable witnesses in any civil proceeding under the Act. The remaining provisions would not change.

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(44) Bill C-31 would have allowed officers to use this information to also identify passengers who were inadmissible to Canada. Bill C-31 also included a similar provision specific to airlines.

B. Head Office and Staff (Clauses 157-158)

The Executive Director of the Board is currently appointed by the Governor in Council, but under the bill that position would become part of the public service.

C. Duties of Chairperson (Clauses 159-160); Functioning of Board (Clause 161)

The Chairperson's duties would be consolidated and expanded somewhat. In particular, the Chairperson would appear to be given more control over the way members performed their duties, including the assignment of administrative duties. New duties would be the power to: designate coordinating members (which now rests with the Governor in Council); identify decisions as jurisprudential guides; and make rules regarding the conduct of people who appeared before the Board. In the House Committee, the rule-making power was clarified to include rules specifying time limits for filing appeals before the Board. There is no mention of "counsel" to the Board (refugee claim officers) as there is in the current Act.

Although the Governor in Council could remove members – other than those in the Immigration Division – to work in a regional or district office, the Chairperson would be able to assign members in other than the Immigration Division to a regional or district office for up to 90 days to satisfy operational requirements.

Bill C-31 would have required the Chairperson to submit an annual report to the Minister on the Board's activities in the previous year. This requirement does not appear in Bill C-11.[45]

D. Provisions that Apply to All Divisions (Clauses 162-169)

Very important rights and procedural rules would be contained in this and the next section. A new provision would allow a single member to form a quorum to hear any matter. With the exception of the Immigration Division, the Chairperson could order a matter to be heard by a panel of three members. The change to single-member panels was first proposed in 1995, and it is anticipated that it would considerably streamline the functioning of the Board.

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(45) In testimony before the Standing Committee on Citizenship and Immigration, Board officials indicated that this requirement was dropped from the bill because the Board is already required – under the *Financial Administration Act* as part of the estimates process – to submit annually a report on plans and priorities as well as a performance report.

All decisions would require reasons; they could be oral or written, except for the Refugee Appeal Division, for which all reasons would be written. The Refugee Protection Division would also have to provide written reasons for rejected claims, or if requested by the parties. The House Committee amended the bill to specify that rules could be made setting out circumstances in which Board members would be required to provide written reasons. The Committee also deleted the phrase "to appeal" from clause 169(f) to ensure that the clause would only apply to judicial review; as mentioned above, time periods for appeals would be set out in Board rules.

E. Provisions that Apply to Divisions Individually (Clauses 170-175)

Currently, the Minister (through a representative) is somewhat restricted in the role he or she may play during a refugee hearing. Bill C-11 would remove these restrictions. The Minister would receive notice of all hearings and, if in attendance, would have the same rights of participation as the claimant.

As noted previously, the appeal by the Refugee Appeal Division would be on paper. The Minister, as well as the person concerned, would be allowed to make submissions. In a provision that should foster consistency across the very decentralized system, decisions on questions of law made by a panel of three members would have the same precedential value for the Refugee Protection Division as a decision of an appeal court has for a trial court.[46] It is not yet evident whether a three-member panel would be the norm; if not, having many decisions made by single-member panels would not be likely to foster consistency.

New from Bill C-31 is the requirement in Bill C-11 that the Immigration Division would have to hold a hearing, where practicable, with respect to any proceeding before it. As mentioned earlier, and also new from Bill C-31, the Immigration Appeal Division would be required to hold a hearing for appeals of residency requirement decisions made outside Canada. Furthermore, the Appeal Division could order the person who is the subject of the residency appeal to physically appear if that person's presence was considered necessary.

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(46) Under Bill C-31, such decisions would have been "binding" on the Refugee Protection Division.

F. Remedial and Disciplinary Matters (Clauses 176-186)

These provisions cover the method of dealing with appointed members of the Board who may have become incapacitated, been guilty of misconduct, failed to perform their duties, or been placed in a position incompatible with their duties. Most of the provisions of the bill would be the same as those in the current Act, with some exceptions. One is that under the bill, the matter could be referred for mediation if the Minister thought it appropriate, and interested parties (in addition to the person concerned) could participate in the inquiry on terms set by the judge. The final decision, as now, would rest with the Governor in Council, who could take any remedial action recommended by the judge, or could substitute another. The Governor in Council would, however, retain the ability to remove members for cause. Because the Chairperson of the Board would initiate the remedial/disciplinary process, reserving this power would leave the Governor in Council with the means of removing the Chairperson if it became necessary.

PART 5: TRANSITIONAL PROVISIONS; CONSEQUENTIAL AND RELATED AMENDMENTS; REPEALS AND COMING INTO FORCE (Clauses 187-275)

Although the *Immigration Act* in general would be repealed, the many provisions governing the investigation and control of immigrant investor funds would continue to be law.

How to treat work in progress can often be controversial when a statute is replaced. Bill C-11 provides, generally, that all matters that had been pending or in progress under the current Act would be governed by the new Act, upon its coming into force, and assigned to the appropriate new Division. However, cases that had begun under the current Refugee Division and in which substantive evidence had been introduced would be governed by the provisions of the current Act, unless a decision had been made. Similarly, if a notice of appeal had been filed with the Immigration Appeal Division under the current Act, the appeal would continue under that Act.

Refugee cases in which a hearing had already commenced before the Refugee Division would not be eligible for the new appeal process. Where decisions had already been made by the Refugee Division at the time the new Act came into force, there would also be no appeal.

Individuals whose appeals were in process to the Immigration Appeal Division but who would not have the same appeal rights under the new law, would lose their right to an appeal unless they had already been granted a stay of their removal order.

There would also be no obligation to issue status documents to permanent residents who obtained that status under the current Act.

Regulations could be made regarding the transition process, "including measures regarding classes of persons who will be subject in whole or in part to this Act or the former Act and measures regarding financial and enforcement matters." This power could be used to cover the situations of groups differently named in the current and future law ("visitors," for example), or to provide for specific situations of transition not appropriately covered by the general rule.

Most of the consequential amendments involve changing references to the *Immigration Act* in other statutes to the proposed Immigration and Refugee Protection Act. Others are consequent on the changes that would eliminate the functions of the Security Intelligence Review Committee. The definition of "enterprise crime offence" in the *Criminal Code* would be amended to include listed offences in the new Act, including the smuggling and trafficking provisions.

COMMENTARY

Bill C-11 received mixed press reviews following its tabling. Some attention was paid to the differences between Bill C-11 and its predecessor, Bill C-31. For example, the expansion of the family class to include parents was praised, while many of the changes were described as "mere tinkering" that would not address key concerns of the bill's critics.

The prospect of a faster and "tougher" refugee determination system appealed to some, as did promises to end abuses in the system, although certain of the proposals that were praised were already in fact in the existing law. The proposal to increase penalties for people smuggling was lauded, although some pointed out that the penalties were already very high and that, in any case, the organizers were generally offshore. Some commentators suggested the bill did not go far enough. The apparent expansion of the scope of refugee protection was questioned.

As noted previously, however, most of the press coverage did not distinguish between provisions actually contained in the bill, those that the government announced it

expected to place in regulations, and administrative changes. The proposed regulatory changes to the family class, for example, could have been made at any time. In the administrative category may be placed the announcement that criminality and security checks for refugee claimants would be commenced upon their arrival, rather than upon their application for permanent residence, as happens now. Clearly that is a change that could also have been made at any point in the past.

Those who commented on the consolidation of most risk reviews at the Immigration and Refugee Board were generally positive, although the restricted appeal rights received mixed reviews. Some commentators harshly criticized the lack of appeal to the Immigration Appeal Division for persons, including permanent residents, found inadmissible on security or criminal grounds. The need for leave in order to have access to judicial review was also questioned. The wide sweep of the regulatory powers in the bill was noted, as was the fact that regulations receive far less public scrutiny (if any) than does a bill.

Refugee advocates called the stricter provisions, particularly for refugee claimants, an overreaction to the arrival of the Chinese migrants in the summer of 1999. The words "draconian," "egregious," "mean-spirited," and "un-Canadian" were used. They wonder whether the new provisions might tarnish Canada's reputation for welcoming newcomers. Concerns were voiced that the bill would weaken protections for refugees; the Minister's rhetoric, said to imply an association between refugee claimants and criminality and security threats, has been decried. On the other hand, the proposed institution of a refugee appeal on the merits was welcomed.

HOUSE OF COMMONS COMMITTEE CONSIDERATION

From late February to mid-May 2001, the House of Commons Standing Committee on Citizenship and Immigration studied Bill C-11. In addition to hearings in Ottawa, public consultations included a one-week trip across Canada at the beginning of May, during which witnesses were heard in Vancouver, Edmonton, Regina, Winnipeg, Toronto, Montreal and Halifax. The Committee heard from a broad spectrum of witnesses representing many perspectives. Nonetheless, numerous witnesses made the following criticism: the bill was being rushed through without sufficient public consultation, given that it would be the first complete overhaul of the *Immigration Act* in about 25 years.

Some of the positive comments witnesses made about the bill and the proposed regulations included:

- the simpler language of the bill and its reorganization to make it more accessible and clear;
- the distinctions made between immigrants and refugees;
- the expansion of the family class to include parents;
- the proposed reduction of the time for spousal sponsorship undertakings from 10 to 3 years;
- the extension of the sponsorship of children to those under 22 years of age;
- the references to the Convention Against Torture;
- consideration of the interests of children, including "the best interests of the child";
- protection for people who fall outside the refugee definition, with the assessment given to the Immigration and Refugee Board;
- an appeal on the merits before the Refugee Appeal Division; and
- less emphasis on the ability to integrate when choosing refugees abroad.

Various witnesses before the House Committee criticized many provisions in Bill C-11 as well as various aspects of the proposed regulations. Some of the witnesses' comments led to amendments by the Committee, as indicated throughout this document. The following were among the most common criticisms and comments by witnesses:

- The language of the bill would place an undue emphasis on enforcement and criminality, as opposed to language that highlights the welcoming nature of Canada's immigration and refugee program.
- Too much of the authority under the bill would be left to regulations. All proposed regulations should be tabled in the House Committee for public consultation. (The House Committee amended the bill to require many proposed regulations be tabled before each House of Parliament and to go to Committees of each House, although such regulations could be made at any time after the tabling.)
- The term "foreign national" would be offensive and confusing, especially because it would include permanent residents. (The Committee defined permanent residents separately.)
- The bill should better recognize the importance of Canada's official languages. (The Committee made several amendments to the bill to this effect.)

- The Department should carry out a gender-based analysis of the impact of the act. (The Committee amended the bill to require that the Department's annual report to Parliament include such an analysis.)
- More emphasis should be placed upon Canada's international obligations, especially in relation to human rights. (The Committee amended the bill to ensure the act would be applied in accordance with international human rights instruments Canada had signed.)
- The bill should explicitly state that the term "common law partner" includes both same- and opposite-sex partners. (The Department has indicated this would be done in the proposed regulations.)
- The bill should include provisions to provide immediate protection to people suffering from sponsorship breakdown due to violence.
- The bill would give immigration officers the power to conduct compelled examinations of non-citizens, including permanent residents, at any time. (The Committee relaxed this authority to some extent.)
- The Minister should at least consider all humanitarian and compassionate applications. (The Committee amended the bill to reflect this.)
- The physical presence test of the residency obligation for permanent residents would not allow sufficient consideration of other reasons why a person might be abroad. (The Department has indicated that further exceptions could be provided in the regulations.)
- The misrepresentation ground of inadmissibility should be limited to misrepresentation in the course of an application, or a provision should be added to allow consideration of humanitarian reasons. Similar concerns were raised about refugee claimants' potential ineligibility because of misrepresentation.
- The power to detain should be restricted, and alternatives to detention should be explored. (The Committee amended the bill to include as possible alternatives to detention the payment of a cash deposit or the posting of a guarantee.)
- The prohibition on access to an appeal before the Immigration Appeal Division for people, including permanent residents, found inadmissible on the grounds of security, violating human rights, serious criminality or organized crime should be removed.
- The requirement for leave for judicial review of overseas decisions should be removed.

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- The automatic jurisdiction of the Security Intelligence Review Committee to review security certificates for permanent residents should be reinstated.
- "Gender" should be included as a basis for persecution to be taken into account when assessing refugee claimants.
- Successful refugee claimants should automatically become permanent residents. (The Committee added a provision explicitly stating in the Act that successful refugee claimants would become permanent residents provided all requirements were met under the Act and they were not inadmissible on grounds of security, serious criminality, etc.)
- The initial eligibility determination for refugee claimants should be eliminated or carried out by the Immigration and Refugee Board.
- Refugee claimants should have access to a second claim if their original claim was unsuccessful. (The Department has indicated that the pre-removal risk assessment was intended to meet this need. The Committee amended the risk assessment evidence rules to allow claimants to present evidence that they could not reasonably have been expected to present initially.)
- The appeal before the Refugee Appeal Division should include a hearing and allow the presentation of new evidence.
- The pre-removal risk assessment should not be conducted by the Department, but rather by the Immigration and Refugee Board, which has the expertise. (The Committee did not change this aspect of the assessment, but did remove the element of "national interest" from the balancing provisions for the assessment.)
- The bill should be amended to prevent the return of *any* persons to countries where they might face torture. (Many witnesses, including the United Nations High Commissioner for Refugees, argued that the Convention on Torture sets out an absolute prohibition on the return to torture and the bill should be amended to reflect this. This issue is currently before the Supreme Court of Canada in the *Suresh* case. The decision in that case, which is expected later this year, could lead to such an amendment.)
- The enforcement provisions relating to human smuggling and trafficking would be broad enough to apply to individuals who claim refugee status in good faith or who assist refugees in fleeing from persecution.

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- The requirement "not to carry to Canada" persons who do not possess the required documentation would place a new liability on transportation companies. Such companies should only be liable for persons they "knowingly" bring to Canada.
- The selection and appointment procedure for Immigration and Refugee Board members should be amended to ensure that members are chosen on the basis of competency.
- The bill should be amended to provide for a transition period during which the current Act would continue to apply temporarily for all pending matters.

The Committee also heard testimony from many groups on issues relating to the proposed regulations, including: the inability of persons on social assistance to sponsor relatives; the regulation of professions and the accreditation of professionals; the ability of recognized refugees to access services; problems with the Live-In Caregiver Program; and the concerns of international students.

SENATE COMMITTEE CONSIDERATION

The Standing Senate Committee on Social Affairs, Science and Technology studied Bill C-11 in October 2001. Many of the witnesses who had testified before the House Committee also appeared before, or presented briefs to, the Senate Committee. On 23 October 2001, the Senate Committee tabled a report with detailed Observations.[47] The key points of these Observations are as follows:

- **Witnesses emphasized that an underlying and widespread problem is the lack of resources available to effectively implement Canada's immigration and refugee programs. The situation has worsened with Departmental downsizing over the past decade coupled with a growing backlog of refugee claims. The Senate Committee suggested that the government evaluate the need to invest in resources for personnel, better enforcement, additional training programs and improved technology.**
- **Based on concerns raised about the quality of Immigration and Refugee Board members and locally engaged overseas staff, the Senate Committee suggested evaluating the need to verify the integrity, qualifications and decision-making ability of such personnel.**

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(47) **The report is available on the website of the Standing Senate Committee on Social Affairs, Science and Technology:**
http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/soci-e/rep-e/rep09oct01-e.htm

- The Senate Committee was concerned with the broad regulation-making power the bill would give to the Department and suggested that *all* changes to regulations be subject to Parliamentary Committee review.
- The Senate Committee agreed with witness suggestions that "grandparents" should be included in the family class by regulation and that "common-law partner" should be explicitly defined in the regulations to include same-sex partners.
- The Senate Committee requested a Ministerial update at the earliest possible opportunity on implementation of the new fraud-resistant permanent resident card.
- While recognizing that an internationally accepted definition of "terrorism" has not yet emerged, the Senate Committee supported the idea of including a definition in legislation provided that the same definition was used in all relevant Canadian legislation. The Senate Committee suggested that the definition from Bill C-36, the *Anti-terrorism Act*, be adapted to the immigration context, and that it be included in the regulations for the new immigration legislation.
- Many witnesses expressed serious concern about clause 64, which would remove the right of a permanent resident convicted of a "serious crime" from appealing his or her deportation before the Immigration Appeal Division. The Senate Committee made three suggestions for addressing these concerns through the regulations: (a) include a requirement that all circumstances of a permanent resident's case be considered when deciding whether to issue a report under clause 44; (b) include consideration of the specific criteria set out in the case *Ribic* v. *Canada (MEI)* when deciding if such a permanent resident should be referred to an adjudication hearing; or (c) enact a domicile provision to allow access to the Immigration Appeal Division for permanent residents who meet a threshold period of establishment in Canada, say five years.
- The Senate Committee urged the Department to evaluate the possibility of federally regulating immigration consultants. Currently, the Committee heard, the lack of such regulation allows dishonest and incompetent persons to claim to be immigration consultants and take advantage of clients.
- The Senate Committee believes that consideration should be given to the definition of "safe third countries." Substantial testimony was heard about the pros and cons of "safe third country" agreements, and the Committee came to the conclusion that the government should work toward implementing the safe third country provision in the bill, particularly through the negotiation of an agreement with the United States.

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- **A number of Senate Committee members were concerned about the retroactive application of Bill C-11 through the transition provisions, especially with respect to appeals and the processing of applications. These Committee members suggested the bill should not force those whose applications had begun under the current legislation to be automatically subject to the new law; they should at least have the choice of which legislation would apply.**
- **The Senate Committee believed the Department should be obliged to report back to the appropriate Committee of each House of Parliament on the implementation of the bill. The Senate Committee noted that it intended to ask the Minister to respond in writing to these Observations six months after the legislation is proclaimed.**
- **The Senate Committee suggested the Senate undertake an in-depth study of all aspects of Canada's immigration and refugee protection system. The study should define the fundamental issues and include a review and analysis of previous governmental studies on the Canadian immigration and refugee systems.**